No. 5277

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LESLIE-CALIFORNIA SALT COMPANY (a corporation), claimant of the American Steamship "Pyramid", her engines, etc.,

Appellant,

vs.

D. L. LARKIN, owner of the American Gasboat "Four Sisters", her engines, etc.,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

This is an appeal from an interlocutory decree in admiralty of the District Court for the Northern District of California, Southern Division, awarding damages to the libellant in a collision case and dismissing the cross-libel.

The case involves a collision between the gasboat "Four Sisters", which was leaving her slip on the San Francisco waterfront, and the steamship "Pyramid", which was maneuvering to enter an adjacent slip. The collision occurred at about 7:45 A. M., October 2, 1926, in close proximity to the pierheads. D. L. Larkin, the owner of the "Four Sisters" filed a libel against the "Pyramid", which was claimed by

her owner, Leslie-California Salt Company, who answered and in turn filed a cross-libel against the "Four Sisters". Larkin claimed the "Four Sisters" and answered the cross-libel. This appeal is prosecuted by the Salt Company from the interlocutory decree, which held the "Pyramid" solely at fault for the collision.

STATEMENT OF FACTS.

There is almost no conflict in the material parts of the testimony. Neither vessel was aware of the proximity of the other until a few seconds before the impact. From that moment on there is the usual conflict as to the movements of the two vessels, but this evidence is not referred to in the opinion of the court below. The learned trial judge based his decision solely upon the undisputed testimony concerning the performance of the two vessels prior to the moment of discovery. We also believe that this part of the evidence is determinative of the fault or lack of fault on the part of each vessel.

The "Pyramid" is a stern wheeler about 161 feet long. The Salt Company, her owner and appellant herein, employs her to collect and deliver cargoes of salt in and around San Francisco Bay and its tributaries. She was under command of Captain A. D. Thompson, an experienced mariner who had acted as her master for about ten years. (Apos. 58.)

On the morning of October 2nd, shortly before eight o'clock, the "Pyramid" left her mooring at pier 17 and backed from the slip, intending to proceed to

pier 25 to deliver a cargo of salt. As she headed out of pier 17, she blew one long blast on her whistle. She continued backing until she had reached a point about 150 feet from the end of pier 17, at which point she went ahead. She was compelled to back once more before she came abreast of pier 21 because she did not answer her helm. Before she came abreast of pier 21, she sounded another blast of her whistle. Her distance from the pier and as she started to pass it was, according to the captain, about 60 feet. She was proceeding under slow bell at about three and a half to four miles an hour. There were two men on her forecastle head. (Apos. 58, 59.)

As the "Pyramid" started to pass pier 21, the master at the wheel and the two men on the bow suddenly saw the gasboat "Four Sisters" about 60 feet away as she came out of the slip and headed across their bow. The master of the "Pyramid" thereupon reversed full speed astern and blew a four blast danger signal and ported his helm. A few seconds later the collision occurred. (Apos. 58, 59.)

The story of the "Four Sisters" is substantially as follows: She is a gasboat 58.5 feet long, of the common gasboat freighter single-ender type, the engines and pilot house being about 40 feet aft of the stem. (Apos. 46.) A certificate of inspection was introduced in evidence on behalf of Larkin, her owner and appellee herein, to show that she was licensed to operate with one operator. (Apos. 40.) On the morning of the collision, however, there were four men on board in the employ of the vessel. Her master, H. B. Hampton, was at the wheel while two men were down

below and one man was standing on the after deck. No one was on lookout. (Apos. 46.)

Prior to the collision, her berth on that morning had been on the south side of pier 23, well up by the bulkhead. (Apos. 44.) When she left she pulled out around the steamer "Henrietta", which was lying just ahead of her, and started out the slip at half speed, five miles an hour, on a course parallel to pier 21 and about 30 feet away from it. When she was about half way out of the slip, she blew one blast on her whistle (Apos. 42), which was an air whistle such as is commonly used on boats of that type. (Apos. 45, 46.)

THE ISSUES.

The learned trial court held that the "Pyramid" was solely at fault for the collision because, first, she was proceeding across the pierhead line of Pier 21 and parallel with it at a distance of less than 500 feet, contrary to the Harbor regulation of the State Board of Harbor Commissioners of the City and County of San Francisco, because, second, regardless of the regulation, her maneuver "to thus proceed masked by covered piers, was a negligent trap for vessels proceeding with due care out of the slip", and third, because her two widely separated slip signals were negligence. The court completely disregarded the excessive speed of the "Four Sisters" while proceeding out of the slip, which was admitted to be five miles per hour, or half speed, (Apos. 45), and the fact that her only lookout was her one man

operator in the pilot house, forty feet aft of the bow. (Apos. 70.)

It is the contention of this brief that not only was the "Four Sisters" negligent in the above respects, but also that this negligence was the sole and proximate cause of the resulting collision.

THE ASSIGNMENTS OF ERROR.

The memorandum opinion of the learned trial court, (Apos. 70), contains the only findings of fact in the case. The assignments of error are all predicated upon this opinion and the facts found therein in themselves sufficiently indicate the issues presented by this appeal.

The assignments of error are as follows:

First: The court erred in holding that under the circumstances then existing the respondent steamer "Pyramid" owned by the claimant and cross-libellant herein, violated a regulation of the State Board of Harbor Commissioners for the port of San Francisco in passing closer to the pierheads than the distance designated in said regulation.

Second: The court erred in holding that under the circumstances then existing, the said steamer "Pyramid" was negligent in passing near the pierheads.

Third: The court erred in holding that the said steamer "Pyramid" was at fault with respect to the whistle signals that she gave.

Fourth: The court erred in holding that the signal given by the gasboat "Four Sisters", owned by the libellant herein, was proper.

Fifth: The court erred in holding that the speed of the said gasboat "Four Sisters" did not contribute to the collision.

Sixth: The court erred in holding that the failure of said gasboat "Four Sisters" to maintain a lookout other than the man at the wheel was not negligence contributing to the collision.

Seventh: The court erred in failing to hold that the collision was due to the fault of the said gasboat "Four Sisters".

Eighth: The court erred in dismissing the cross-libel herein.

Ninth: The court erred in making and entering its interlocutory decree herein in favor of the libellant, and in failing to enter an interlocutory decree herein in favor of the claimant and cross-libellant.

These assignments may be grouped and will be discussed under the following propositions:

1. Under the circumstances of this case, the conduct, operation and navigation of the "Pyramid" was free from any fault, (first, second, third and ninth assignments) because—

(a) In proceeding on a course closer to the pier-heads than 500 feet therefrom, as provided by the regulation of the State Board of Harbor Commissioners, the "Pyramid" did not violate that regulation under proper construction thereof. (First assignment.)

(b) The "Pyramid" was not negligent under the circumstances then existing in passing near the pier-heads. (Second assignment.)

(c) The whistle signals given by the "Pyramid" were lawful and proper under the law and in accordance with prudent navigation. (Third assignment.)

2. The conduct, operation and navigation of the "Four Sisters" was negligent and the sole and proxi-

mate cause of the resulting collision, (fourth, fifth, sixth, seventh and eighth assignments) because—

(a) The whistle signal given by the "Four Sisters" when leaving the slip was improper and insufficient. (Fourth assignment.)

(b) The speed of the "Four Sisters" while leaving the slip was excessive and improper. (Fifth assignment.)

(c) The failure of the "Four Sisters" to maintain a lookout other than the man at the wheel was improper and a fault. (Sixth assignment.)

ARGUMENT.

I.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE CONDUCT, OPERATION AND NAVIGATION OF THE "PYRAMID" WAS FREE FROM ANY FAULT.

(a) In Proceeding on a Course Closer to the Pierheads Than 500 feet Therefrom, as Provided by the Regulation of the State Board of Harbor Commissioners, the "Pyramid" Did not Violate That Regulation Under Proper Construction Thereof.

The first charge of negligence made by the learned trial judge against the "Pyramid" is that "after near fifteen minutes of 'hovering' off the ends of piers 17 and 19, she proceeded across the pierhead line of 21 and parallel with it at a distance of less than 500 feet", contrary to the harbor regulation. (Apos. 70.)

At the very outset it should be observed that the validity of this harbor regulation is open to serious

doubt. The existence of any such regulation was denied in the answer to the libel. (Answer, par. VIII, Apos. 15.) This denial was intended to raise the issue of the validity of the adoption of the regulation, that is, whether or not the State Board of Harbor Commissioners had power to make the regulation.

The regulation in question reads as follows:

> "Vessels must not run within 500 feet from and parallel to the pierhead line." (Apos. 37.)

The authority of the State Board of Harbor Commissioners for the port of San Francisco to make rules and regulations concerning the property of the state under their control is contained, defined and limited in *Section 2524* of the *Political Code of the State of California,* in the paragraph headed "Rules and Regulations", *page 754* of the *Political Code.* This paragraph is as follows:

> "The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state which is intrusted to them by virtue of this article, and said commissioners are hereby authorized and required to make, without delay, and from time to time, and publish not less than thirty days in a daily newspaper of general circulation published in the city and county of San Francisco, all needful rules and regulations not inconsistent with the laws of the state or of the United States in relation to the mooring and anchoring of vessels in said harbor, providing and maintaining free, open and unobstructed passageways for steam ferryboats and other steamers navigating the waters of the bay of San Francisco and the fresh water tributaries of said bay so that such steamers can conveniently make their trips without impediment from vessels at anchor or other obstacles."

An examination of the alleged rule in the light of the above section of the Code would seem to indicate that there is grave doubt of the authority of the Board of Harbor Commissioners to make it because the specific authority conferred is authority to make

> "* * * all needful rules and regulations not inconsistent with the laws of the state or of the United States in relation to the mooring and anchoring of vessels in said harbor, * * *."

and the alleged rule refers to neither mooring nor anchoring but to navigation. It is submitted, therefore, that the adoption of this rule was utterly beyond the power of the Board of Harbor Commissioners and that consequently it has no validity as a local rule or regulation.

But even if it be conceded that the Board of Harbor Commissioners did have power to adopt this rule or regulation, it has no application as such to the facts of this case. A local rule of this character was, we submit, never intended to apply to a vessel which was simply changing from her berth or dock to another berth or dock a short distance away.

The piers to the north of the ferry building in San Francisco are numbered by odd numbers (Mr. Bell's opening statement, Apos. 33), and it is therefore apparent that when the "Pyramid" left Pier 17 to proceed to pier 25, she was changing her berth from pier 17 to the fourth pier north thereof, or in other words, a very short distance.

In construing any alleged local rule of navigation, the court is entitled to look to and accept the interpretation of that rule adopted by local authorities, and

where the local authorities neglect to enforce it or enforce it only under certain circumstances, the federal courts will not be more zealous in their interpretation.

The James Gray v. The John Frazer, 21 How. 184; 16 L. Ed. 106.

During the trial, James Byrne, Jr., Assistant Secretary of the Board of Harbor Commissioners, testified as follows:

"Mr. EVANS. Q. Is that rule enforced with respect to vessels changing their berths a short distance away?

Mr. BELL. Objected to as calling for the conclusion of the witness.

The COURT. The objection will be sustained.

Mr. EVANS. If your Honor please, Mr. Byrne is an officer of the Harbor Commissioners——

The COURT. I know, but you are asking if it is enforced.

Mr. EVANS. He certainly should know if that rule is enforced.

Mr. BELL. It is immaterial whether it is or not.

The COURT. If you can show any action by the Board which provides that this rule does not apply to vessels passing from berth to berth, that may be a different matter. The objection is sustained.

Mr. EVANS. Has the Board of Harbor Commissioners ever interpreted that rule?

Mr. BELL. The same objection.

The COURT. You may answer, it is preliminary.

Mr. EVANS. Has the Board ever interpreted that rule in any way, shape or form as to what it does mean?

A. They have notified various vessels that run within that limit that that was their rule and asked them to observe it.

Q. Under what circumstances?

Mr. BELL. The same objection, immaterial, irrelevant and incompetent.

The COURT. Overruled; if not competent the Court will not give it any consideration.

A. Vessels that operate like the 'Harvard' and 'Yale' and those that would create a wash, and disturb the vessels that are tied to the piers.

Mr. EVANS. Q. Navigating under what circumstances—for a long distance along the pierhead line?

A. Yes.

Q. Has a complaint ever been brought to your attention regarding vessels running a shorter distance along the pierhead line?

A. Not a short distance; no." (Apos. 37-38.)

This evidence given by Mr. Byrne is undisputed and from it it appears that the only vessels that have ever been notified by the Board with respect to their observation of this rule are vessels that operate like the "Harvard" and "Yale" and those that would create a wash and disturb the vessels that are tied to piers. In short, the application of the rule has been limited to vessels navigating for a long distance along the pierhead line and the Board of Harbor Commissioners have never received a complaint nor enforced the rule with regard to vessels running a shorter distance along the pierhead line.

The undisputed testimony therefore brings the enforcement of the regulation in this case squarely within the rule laid down by Mr. Chief Justice Taney in the case of *The James Gray v. The John Frazer, supra,* in which the learned Chief Justice used the following language:

"Yet, upon the evidence before the court, we do not think The James Gray ought to be regarded as in fault, by remaining at anchor in the harbor beyond the time limited in the city ordi-

> nance. She was seen there by the harbormaster day after day, without being ordered to depart; nor did he seek to inflict the penalty. The object of this regulation was obviously to prevent this thoroughfare from being crowded by vessels at anchor, which would make it inconvenient or hazardous to vessels coming into the port. And from the conduct and testimony of the harbormaster, it may be fairly inferred that this regulation was not strictly enforced when the thoroughfare was not overcrowded, and that single vessels were sometimes permitted to remain beyond the time fixed by the ordinance without molestation from the city authorities. And this lax execution of the regulation would soon become a usage in the port, and will account for the indifference with which the harbormaster saw her lying there three days beyond the limited time, without even remonstrance or complaint. He appears to have acquiesced. And if this was the interpretation of the ordinance by the local authorities, it ought not to be more rigidly interpreted and enforced by this court." (62 U. S. 184; 16 L. Ed. 106 at p. 108.)

We submit, therefore, that the harbor regulation in question has never been construed by the State Board of Harbor Commissioners as applicable to vessels engaged in shifting from one berth to another a short distance away. Any such construction would be utterly opposed to common sense. Under such a construction, a vessel desiring to move to an adjacent pier or one less than a thousand feet away would be obliged first to head out five hundred feet, then pursue a course parallel to the pierhead line until opposite her destination, and then head in for another distance of five hundred feet. The common sense view of the situation is well expressed by Adams, District Judge,

in the following language, which we submit is peculiarly applicable to the facts in the case at bar.

> "The Stella was unavoidably near the ends of the piers in performing her necessary movements. She could not be expected to go out into the river considering the short distance she had to traverse." (*The Transit,* 148 Fed. 138 at p. 139.)

We submit, therefore, that the navigation of the "Pyramid" in this case did not constitute a violation of the San Francisco Harbor regulation properly construed and that consequently the "Pyramid" was not negligent *per se* merely because she was navigating within less than five hundred feet of the pierheads.

(b) The "Pyramid" Was Not Negligent Under the Circumstances Then Existing in Passing Near the Pierheads.

Although the "Pyramid" was not, as we have seen, under any duty to proceed five hundred feet out into the stream before shaping her course from pier 17 to pier 25 *(The Transit, supra),* she nevertheless was under a duty, under the circumstances to navigate with extreme caution. It is well settled that where vessels meet off the end of a pier or near a slip, both should navigate with extreme caution. Under such circumstances the statutory steering and sailing rules have little application to the vessel which is coming out of a slip and before she is on her course, but the case is rather one of special circumstances and the general prudential rules should govern.

The Servia, 149 U. S. 144; 37 L. Ed. 681;
The Moran, 254 Fed. 766 (2 C. C. A.);
The Komuk and The Don Juan, 50 Fed. 618.

The test therefore is whether or not the "Pyramid" was navigated with caution under the circumstances, and that is to be determined by her conduct and not by the mere fact that she was navigating in close proximity to the pierheads.

In examining the conduct of the "Pyramid", we find that prior to the collision she was proceeding under a slow bell at a speed of approximately three and a half or four miles per hour, as Thompson, her master testified. (Apos. 59.) The "Pyramid's" engineer, Adams, testified that he would judge her speed about three miles an hour, (Apos. 65), and Engstrom, one of the lookouts on the "Pyramid", was of the same opinion. (Apos. 67.) This evidence is uncontradicted and we think it may be safely assumed that the speed of the "Pyramid" was not in excess of four miles an hour and was in all probability between three and three and a half. It also appeared that she was operating against a flood tide, though it was admitted that the tide did not amount to very much in close to the docks. (Apos. 62.) In view of these circumstances, we submit that no fault can be charged against the "Pyramid" by reason of her speed. Furthermore, it appears clearly enough that she had a proper and efficient lookout so that even the learned trial judge could not criticise her conduct on this account.

The vice of the opinion of the learned trial judge, (Apos. 70) is that he condemned the "Pyramid" largely because of her proximity to the pierheads, not only upon the ground that this proximity constituted a violation of the harbor regulation, but upon the further

ground that navigation in close proximity to the pierheads constituted "a negligent trap for vessels proceeding with due care out of the slip". It is true that the learned trial judge also charged the "Pyramid" with negligence because of her "two widely separated slip signals", which we shall shortly discuss, but we submit that no one can read his opinion without reaching the conclusion that the "Pyramid" was condemned on account of her location and not because of her conduct. This, we submit, was manifest error on the part of the learned trial judge.

(c) The Whistle Signals Given by the "Pyramid" Were Lawful and Proper Under the Law and in Accordance With Prudent Navigation.

The undisputed testimony in this case shows that when the "Pyramid" backed out of pier 17 she blew one long blast of the whistle and that she blew one blast before she reached pier 21, (Apos. 58), and while abreast of pier 19. (Apos. 54, 63.) These are the "two widely separated slip signals" characterized by the learned trial judge as negligence. (Apos. 70.) In his opinion these signals indicated entry or departure from slips and not at all a dangerous maneuver across the pierhead line, which latter he suggested might have been indicated by a rapid series of whistles.

The rules of navigation require that vessels leaving or entering a slip shall give one long blast of the whistle to warn other vessels of their intentions. This is provided for in Rule V of Article 18, of the *Inland Rules* which is as follows:

> "Rule V. Whenever a steam-vessel is nearing a short bend or curve, in the channel, where, from

the height of the banks or other cause, a steam-vessel approaching from the opposite direction cannot be seen for a distance of half a mile, such steam vessel, when she shall have arrived within half a mile of such curve, or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly.

When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules." (*Comp. Stats.*, Sec. 7892; *Rule V, Act June 7, 1897,* c. 4, Sec. 1, Art. 18.)

There can be no question, therefore, that the first signal blown by the "Pyramid" when she started to back out of pier 17 was lawful, proper and in strict compliance with the rule.

Moreover, it is equally apparent that the second signal blown when the "Pyramid" was abreast of pier 19 was an appropriate and lawful signal. This is the signal to be blown at a bend, and we submit that the projecting pier which masks vessels behind it, is just as much a danger to navigation as a bend in a river. Both cases deal with a situation that arises when one vessel is hidden from the sight of the other and the

long blast of the whistle is the appropriate and lawful manner of dealing with the situation.

It will be observed that the learned trial judge not only charged the "Pyramid" with fault for blowing these lawful and proper slip signals, which he said were misleading, but also found her at fault for failing to blow "a rapid series of whistles". (Apos. 70.)

"A rapid series of whistles" can signify only one thing and that is the alarm signal provided for in Rule III of Article 18 of the *Inland Rules,* which reads as follows:

> "Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (*Comp. Stats.,* Sec. 7892, *Rule III, Act of June 7, 1897,* c. 4, Sec. 1, Art. 18.)

At the time the "Pyramid" blew one blast of the whistle when off pier 19, the "Four Sisters" was still in the slip and invisible to the "Pyramid". Consequently, Rule III of the *Inland Rules* is totally inapplicable because the "Pyramid" did not know that the "Four Sisters" was coming out of the slip and obviously could have entertained no doubts as to the course or intention of a vessel of whose existence she was not even aware.

The error into which the learned trial judge has fallen is patent. The "Pyramid" has been condemned for doing that which the law requires, and also for failing to do that which the law forbids. Sound signals are to be blown only when certain conditions

actually exist, and when those conditions do not exist, the blowing of inappropriate sound signals is a fault which has been severely condemned.

We have now examined in detail all the charges of negligence made by the learned trial judge against the "Pyramid" upon the basis of which he held the "Pyramid" solely to blame for this collision, and we submit that not one of these charges finds any support in the evidence and the law applicable thereto. The "Pyramid" was not at fault merely because she was operating in close proximity to the pierheads in view of the fact that she was shifting to a berth only four piers north. Her navigation and conduct during this maneuver were entirely free from blame. Her speed was moderate, and in fact merely sufficient to give her steerage way against the flood tide. She had two lookouts against whom no criticism has been urged. She blew appropriate and lawful signals fully adapted to the circumstances which existed, and calculated to warn any shipping in the slips of her proximity. We submit the "Pyramid" was free from fault of any kind and her owner should have had a decree against the "Four Sisters" on its cross-libel.

II.

THE CONDUCT, OPERATION AND NAVIGATION OF THE "FOUR SISTERS" WAS NEGLIGENT AND THE SOLE AND PROXIMATE CAUSE OF THE RESULTING COLLISION.

The learned trial judge not only found that the "Pyramid" was negligent in the respects hereinbefore discussed, but he also acquitted the "Four Sis-

ters'' of any fault or responsibility for the collision. In his opinion he specifically stated that ''in these circumstances the speed of the 'Four Sisters' and her only lookout, her one man operator in the pilot house, forty feet aft of the bow, are not negligence contributing to the collision''. (Apos. 70.) In our view the negligence of the ''Four Sisters'' so casually glossed over by the learned trial judge not only *did* contribute to the collision, but was its sole and efficient proximate cause.

(a) The Whistle Signal Given by the ''Four Sisters'' Was Improper and Insufficient.

We have already discussed in connection with the ''Pyramid'', the duty of vessels to blow one long blast of the whistle when leaving or entering a slip for the purpose of warning other vessels of their intentions. The rule is silent as to when this whistle should be sounded, but as it applies to vessels leaving a slip, it is held that the whistle should be sounded at the moment calculated to give the greatest and most timely warning to vessels navigating in the vicinity.

The Daniel Willard, 235 Fed. 112 (2 C. C. A.);
The Edouard Alfred, 261 Fed. 680.

Although no whistle from the ''Four Sisters'' was heard by the ''Pyramid'', nevertheless there was testimony in the record sufficient to justify a finding that the ''Four Sisters'' did in fact blow a slip whistle. Hampton, her master, so testified, (Apos. 45), and he was corroborated by a disinterested witness, Davis, (Apos. 53), who testified that the ''Four Sisters was a little more than half way out of the slip when she

blew the whistle. Hampton had previously testified that he was just about half way out at the time. (Apos. 45.)

With regard to the efficiency of this whistle, Thompson, master of the "Pyramid" testified that he did not hear the whistle and that if the whistle had been blown at the bulkhead, it could not have been heard. He also testified that the whistle "has a very poor sound" and "you want to be very close to it when you hear it or you never hear it". (Apos. 60.)

The only testimony which tends at all to contradict this testimony regarding the inefficiency of the whistle is that of Hampton, master of the "Four Sisters", who testified that the whistle was efficient, had been recently inspected, did not require any repairs, and was a regular gasboat whistle. (Apos. 45-46.) On the other hand, Larkin, the owner of the "Four Sisters" was in the cabin of the "Four Sisters" at the time the whistle was blown and did not hear it. (Apos. 52.)

While we concede that there is evidence enough to justify a finding that the "Four Sisters" did blow a slip whistle, we think it is equally clear that the whistle was blown at or about the time she was half way out of the slip and that the whistle itself was a poor and inefficient instrument.

It was at best a gasboat whistle with little sound carrying power and under the circumstances it should have been blown at that point where it was most likely to be heard by shipping outside the slip and in the vicinity of the pierheads. As Thompson, the mas-

ter of the "Pyramid", put it, "just before I saw him he should have blown his whistle". (Apos. 60.) If blown at that time there might have been a chance of its having been heard, but blown as it was about half way up the slip, there was little possibility that it could have been heard. There were four men on board the "Four Sisters", (Apos. 46), of whom only two, Hampton, the master, and Larkin, the owner, testified at the trial. Hampton testified that he blew the whistle and heard it. Larkin did not hear it, although Davis, on the dock did. If Larkin himself, being then on board the "Four Sisters" did not hear this whistle, it is not surprising that the "Pyramid" did not hear it, and the reasons it was not heard were because, first, it was blown when the "Four Sisters" was too far back in the slip, and secondly, because it was merely an apology for a whistle.

Where a signal is given by a vessel but its whistle is so feeble, imperfect or inefficient that it gives no notice of its proximity to neighboring vessels, the vessel blowing such whistle is at fault.

The Luray, 24 Fed. 751;

Act of June 7, 1897, c. 4, Sec. 1, Art. 15; *Comp. Stats.* 7888;

The Motorboat Act, Act of June 9, 1910, chap. 268, Sec. 4, *Comp. Stats.* 8280;

La Boyteaux, Rules of the Road at Sea, 1920, pages 65-66.

(b) The Speed of the "Four Sisters" While Leaving the Slip Was Excessive and Improper.

The "Four Sisters" was leaving a slip lying between piers upon which were large covered structures so that her view of any vessel coming from the direction in which the "Pyramid" came was completely obstructed. (Apos. 50.) The speed of the "Four Sisters" while leaving the slip was half speed, or about five miles per hour, which was steadily maintained. (Apos. 45.) When the "Four Sisters" first saw the "Pyramid", the distance between the two vessels was approximately seventy-five feet, and the "Pyramid" was about a hundred feet out from the wharf, which point marks the scene of the collision. (Apos. 46.)

Where a vessel is coming out from behind a covered pier so that it is impossible for her to notice other vessels which may be navigating in the vicinity of the pierheads, the uniform rule is that she must use great caution and run slow enough to enable her to come to a stop in time to avoid collision with any craft which she may discover upon reaching the end of the dock.

The S. A. Carpenter, 275 Fed. 716;
The Edouard Alfred, 261 Fed. 680;
The Daniel Willard, 235 Fed. 112, (2. C. C. A.);
The Fearless, 156 Fed. 428.

That the speed of the "Four Sisters" did not conform to this requirement is too plain for argument. The facts speak for themselves. Although there was 75 feet between the two vessels when the "Pyramid" was first seen by the "Four Sisters", yet the latter

either did not or could not stop or reverse in time to avoid the collision. At any rate she did neither and the collision resulted.

Yet the learned trial judge completely disregarded the speed of the "Four Sisters" in fixing responsibility for the collision. We submit that in so doing he committed manifest error.

(c) The Failure of the "Four Sisters" to Maintain a Lookout Other Than the Man at the Wheel Was Improper and a Fault.

The record shows that although there were four men on the "Four Sisters" and in the employ of her owner, (Apos. 46, 49), there was nevertheless no lookout. (Apos. 46.) The only person who might be said to have served in such a capacity was Hampton himself, the master and operator, who was in the wheel house forty feet aft of the bow. (Apos. 46.)

The duty of a lookout and the duty to maintain a lookout are of the highest importance. Every doubt as to the performance of this duty and the effect of nonperformance should be resolved against the vessel sought to be inculpated unless she vindicates herself by testimony conclusive to the contrary.

The Ariadne, 13 Wall. 475, 20 L. Ed. 542 at 543;
The Marsh Cock, 27 Lloyd's List L. R. 101;
Curtis v. Kaga Maru, 1927 A. M. C. 664 at p. 670 (W. D. Wash.).

A vessel coming out of a slip must maintain an efficient lookout.

The S. A. Carpenter, 275 Fed. 761;
The Edouard Alfred, 261 Fed. 680;

The William Jamison, 241 Fed. 950 (2 C. C. A);
The Cotopaxi, 20 Fed. (2d) 569.

A lookout maintained only by the man at the wheel is insufficient. The law will not permit a divided duty in this regard.

The William Jamison, 241 Fed. 950 (2 C. C. A.);
The Albatross, 1927 A. M. C. p. 424 (Feb. 2-1927, W. D. Wash.).

The duty to provide a lookout applies to small vessels such as motorboats and gasboats, maintaining small crews, as well as to larger vessels with numerous crews.

The O'Brien Bros., 258 Fed. 614 (2 C. C. A.);
The Albatross, 1927 A. M. C. p. 424.

At the trial there was offered in evidence on behalf of the "Four Sisters" a certificate of inspection made by the United States officials. (Libellant's Exhibit 2.) This offer was made for the purpose of showing that the "Four Sisters" could be lawfully operated by one man, nevertheless, the law is perfectly clear that the duty to provide a lookout is just as mandatory upon the owner of a small gasboat such as the "Four Sisters" as it is upon a liner. In the case of *The O'Brien Bros.,* supra, a one man boat was involved, and in the case of *The Albatross,* supra, Judge Neterer went out of his way to warn small boat operators of the mandatory character of the rule.

It is not contended that small boats must necessarily carry a large crew, but only that if the entire operation of a small boat is entrusted to one man, he must

take the consequences, if by reason of his failure to maintain a lookout, a collision results.

There were three men on the "Four Sisters" besides Hampton, all in the employ of the gasboat, and it would have been an exceedingly simple matter to have posted one of them in the bow as a lookout. Certainly Hampton himself cannot pose as a lookout when, on a boat only 58 feet long, he is stationed 40 feet aft of the bow.

The failure to maintain an efficient lookout while leaving the slip is a gross and inexcusable fault on the part of the "Four Sisters" and contributed in no small degree to the collision. When the "Pyramid" was first seen there was approximately 75 feet between the two vessels, and the observer who so testified, namely, Hampton, was 40 feet aft of the bow of the "Four Sisters". There can be no doubt that had the observer been stationed on the bow instead of 40 feet aft, he would have seen the "Pyramid" very much sooner than he did. There would have been time to reverse the engine as the "Pyramid" did and there would have been no collision.

This flagrant fault of the "Four Sisters" was waived aside by the learned trial judge as having no bearing on the collision, and here again we submit his error is manifest.

To our mind the negligence of the "Four Sisters" is conclusively established by the record. It consists in the cumulative effect of a number of faults, any one of which alone should be sufficient to charge the "Four Sisters" with sole responsibility for the collision. Her whistle was inefficient, it was blown at

the wrong time, her speed was excessive, and she had no lookout. Under such circumstances collisions are well nigh inevitable when vessels are masked from each other by intervening obstructions.

CONCLUSION.

We submit that the decision of the learned trial judge is little short of a miscarriage of justice. The "Pyramid", which we think was blameless, has been charged with sole fault for a collision resulting from nothing in the world but the gross negligence and fault of the "Four Sisters". In any event, if this court should also find, as did the learned trial judge, that the "Pyramid" was negligent, we submit that the "Four Sisters" was far more negligent and therefore the "Pyramid" is at least entitled to half damages.

We respectfully urge that the interlocutory decree of the trial court should be reversed with instructions to enter an interlocutory decree in favor of the appellant, (cross-libellant below) and to make the usual reference to ascertain the amount of appellant's damages.

Dated, San Francisco,
February 20, 1928.

Respectfully submitted,

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